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In The

Supreme Court of the United States

October Term, 1991

WAYNE SNOW, JR., Chairman,
Georgia State Board of
Pardons and Paroles,

Petitioner,

v.

C. T. AKINS and JAY M. FATE,

Respondents.

Petition For Writ Of Certiorari To the United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Eleventh Circuit Court of Appeals decision that the discretionary intervals between parole reconsiderations are a part of parole "eligibility" and subject to the prohibitions of the ex post facto clause conflict with the holding in *Collins v. Youngblood*, 497 U.S. ___, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)?

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No. _____

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WAYNE SNOW, JR., Chairman,
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v.

C. T. AKINS and JAY M. FATE,

Respondents.

Petition For Writ Of Certiorari To the United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Wayne Snow, Jr., Chairman of the Georgia Board of Pardons and Paroles, respectfully prays the writ of certiorari issue to review the judgment of the Eleventh Circuit Court of Appeals entered on February 7, 1991.

OPINIONS BELOW

The original panel decision of the Eleventh Circuit Court of Appeals was reported in *Akins v. Snow*, 922 F.2d

1558 (11th Cir. 1991), decided February 7, 1991, and a copy of that opinion is included in the Appendix to the instant Petition as Appendix B. The opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, was issued June 28, 1989, and is included as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 7, 1991. *See Akins v. Snow,* 922 F.2d 1558 (11th Cir. 1991). This Petition for Writ of Certiorari has been filed within the allowable ninety days from that date. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

U.S. Const., Art. I, Sec. X, Cl. I.

"No state shall . . . pass any . . . ex post facto law. . . . "

STATEMENT OF THE CASE

C. T. Akins, Jay M. Fate and Michael Schroeder filed the instant action pro se in the United States District Court for the Northern District of Georgia, Atlanta Division. They sought declaratory judgment, injunctive relief and/or damages against the Chairman of the State Board

of Pardons and Paroles alleging unconstitutional application of certain rules of the Board.

Cross-motions for summary judgment were filed by the parties. Upon consideration of the motions, Judge Richard C. Freeman granted summary judgment in favor of Petitioner Snow and denied Respondents' motion for summary judgment. Akins and Fate appealed this decision; Schroeder did not. Counsel was appointed to represent Akins and Fate on the appeal.

On appeal, the Eleventh Circuit panel reversed the decision of the district court and remanded the case for consideration of the issue of relief and entry of judgment in favor of Respondents/Appellees. Rehearing en banc was requested of the Court of Appeals but was denied.

REASONS FOR GRANTING THE WRIT

A. THE ELEVENTH CIRCUIT DECISION IS CONTRARY TO THE RECENT DECISION IN *COLLINS V. YOUNGBLOOD*, 497 U.S. ___, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990).

As the opinion of the Eleventh Circuit Court of Appeals notes, this Court has never held that parole eligibility is a part of a prisoner's sentence subject to the prohibitions of the ex post facto clause. *Akins v. Snow*, Case No. 89-8622 (11th Cir., Feb. 7, 1991). A recent decision by this court, *Collins v. Youngblood*, 497 U.S. ___, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990), narrowly defines the parameters of the ex post facto clause so as to exclude parole "eligibility" from its scope.

In *Collins*, this Court in a unanimous decision entered June 21, 1990, examined the historical definition of the ex post facto clause and specifically overruled two long-standing Supreme Court cases which "unjustifiably" expanded the definition of the ex post fact clause. *See Collins*, 110 S.Ct. at 2722. In so doing, the Court cited, with approval, the following definition of the ex post facto clause:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a crime, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender.*

Id. at 2719, quoting *Calder v. Bull*, 3 Dall. 386, 391 L.Ed. 648 (1798) (opinion of Chase, J.) (emphasis in original).

Collins notes that previous cases attempting to expand upon the above definition have caused "confusion among lower courts concerning the application of the ex post facto clause to changes in rules of evidence and procedure." *Id.* at 42, quoting *Murphy v. Kentucky*, 465 U.S. 1072, 1073 (1984) (White, J., dissenting from denial of certiorari). As the Court notes, lower courts have seized upon language in previous Supreme Court cases which indicated that "procedural" changes in law could violate the ex post facto prohibitions by affecting "matters of

substance" or depriving a defendant of "substantial protections with which the existing law surrounds the person accused of a crime," or arbitrarily infringing upon "substantial personal rights." *Id.* at 2720, citing *Duncan v. Missouri*, 152 U.S. 377 (1894); *Malloy v. South Carolina*, 237 U.S. 180 (1915); *Beazell v. Ohio*, 269 U.S. 167, 171 (1925). In seeking to explain the true meaning of such phrases, however, this Court stated:

> The references in *Duncan* and *Malloy* to "substantial protections" and "personal rights" should not be read to adopt without explanation an undefined enlargement of the ex post facto clause.

Id. at 2721.

Collins defines and clarifies those types of procedural matters which would violate ex post facto prohibitions by unconstitutionally infringing upon "substantial protections" and "personal rights." The Court also overrules two previous decisions which broadened the scope of the ex post facto clause.

The first case overruled by the court, *Kring v. Missouri*, 107 U.S. 221 (1883), defined an ex post facto law as one which "in relation to the offense or its consequences, alters the situation of a party to his disadvantage." *Id.*, citing *Kring*, 107 U.S. at 228-29. The Court rejected such a broad definition of the ex post facto clause. In overruling the *Kring* decision, the Court stated:

> The holding in *Kring* can only be justified if the Ex Post Facto Clause is thought to include not merely the *Calder* categories, but any change which "alters the situation of a party to his disadvantage." We think such a reading of the Clause departs from the meaning of the Clause

> as it was understood at the time of the adoption of the Constitution, and it is not supported by later cases.

Collins, 110 S.Ct. at 2723.

The second case, *Thompson v. Utah*, 170 U.S. 343 (1898), stated that the ex post facto clause was violated when a procedural change in the law affected "a substantial right involved in (the accused's) liberty." *Collins*, 110 S.Ct. at 2724, citing *Thompson*, 170 U.S. 352. In overruling the *Thompson* decision, this Court indicated that only those rights which affect the definitions of crimes, defenses or punishments are the concern of the ex post facto clause. *Collins*, 110 S.Ct. at 2724. This Court noted that the right to jury trial which was at issue in *Thompson* was a "substantial" right, but since it had nothing to do with the definition of crimes, defenses or punishments, did not fall within the scope of the ex post facto clause. *Id.*

Collins states that the Court's departure, in *Kring* and *Thompson*, from the definition of the ex post facto clause provided in *Calder v. Bull* was "unjustified." *Id.* at 2722. In fact, the Court indicates that a definition of ex post facto laws as any laws which "alter the situation of a party to his disadvantage" is unwarranted and inconsistent with Supreme Court precedent. *Id.*

In the instant action, the Eleventh Circuit Court of Appeals has determined that by changing the maximum time interval between parole reconsiderations (the definition of which is discussed in Section B, below), the Board

of Pardons and Paroles has somehow increased the punishments annexed to Plaintiffs' crimes. The Eleventh Circuit rejects the notion that such a change is procedural. Given the *Collins* decision's clarification of the scope of ex post facto and the meaning of "procedural" changes, the Eleventh Circuit's decision is incorrect.

As Justice Stevens points out in his concurring opinion in *Collins* (in which Justices Brennan and Marshall join):

> Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit the legislative control of *remedies and modes of procedure* which do not affect matters of substance.

Id. at 2727 (citations omitted) (emphasis added). In making a determination of "matters of substance," the concurrence suggests that the "analysis should focus on the impact of the change upon the 'right belonging to [the defendant] when the offense was committed.' " *Id.*, quoting *Thompson*, 170 U.S. at 351. Justice Stevens hastens to point out that "a procedural protection is likely to be substantial, when viewed from the time of the commission of the offense, *only if it affects the modes of procedure by which a valid conviction or sentence may be imposed.*" *Id.* (Emphasis added).

In determining "matters of substance," the concurrence indicates that it is appropriate to consider whether the plaintiff claims:

(1) he was denied any procedural protections relevant to the determination of his guilt or innocence;

(2) the sentence imposed was unauthorized by law or that it was the consequence of improper procedures; and

(3) he has been deprived of any avenue of review for correcting errors that may have vitiated the validity of his conviction or sentence.

Id. at 2728. None of these factors is present in the instant case. As Justice Stevens states, "a procedural protection does not become substantial merely because it meets the low threshold [stated above]. It does, however, become insubstantial by failing to do so." *Id.* Analyzed under this test, the instant action is not one which the concurring Justices define as the deprivation of a "substantial" right in violation of the ex post facto clause.

At the time Akins and Fate committed their crimes, the awarding of parole to an incarcerated life sentenced inmate was a discretionary act of the Board of Pardons and Paroles. This circumstance has not changed. *See Damiano*, 785 F.2d at 929.

In addition to the above, at the time Akins and Fate committed their crimes, the rules of the Board of Pardons and Paroles setting the maximum intervals between parole reconsiderations were clearly subject to change. O.C.G.A. § 42-9-45. Thus, any reliance upon such time intervals would have been speculative and unwarranted. As the *Collins* concurrence points out:

> The mere possibility of a capricious and unlikely windfall is not the sort of procedural protection

> that could reasonably be judged substantial from the perspective of the defendant at the time the offense was committed.

Collins, 110 S.Ct. at 2728. Reliance upon the suppositions that life-sentenced inmates initially denied parole would thereafter be reconsidered annually and perhaps granted parole is reliance upon just such caprice or unlikely windfall.

B. THE ELEVENTH CIRCUIT'S DECISION IS BASED UPON ERRONEOUS FACTS.

At the outset of its opinion, the Eleventh Circuit defines a "parole reconsideration hearing," stating:

> We use the terms parole consideration hearing and parole reconsideration hearing to include the Board's interview of the inmate, the Board's investigation of the inmate, the Board's discussion of the inmate and the Board's subsequent decision whether the inmate should be paroled.

Akins v. Snow, 922 F.2d at 1561, n.8. These terms are repeated frequently throughout the Eleventh Circuit's opinion. In reality, however, no "hearing" is required as defined by the Eleventh Circuit.

In conducting a parole consideration or reconsideration, the members of the Board of Pardons and Paroles are provided with updated inmate files containing the most current information received by the Board with regard to each inmate. In conducting a parole consideration, the Board members review the files and suggest potential time periods that, based upon the file, the members believe the particular inmate should serve. The Board then votes whether to grant or deny parole.

No "hearing" is required by the statutes, nor is one normally held with relation to parole considerations. O.C.G.A. § 42-9-43. The Board does not always interview the inmate nor always conduct a special investigation of the inmate for the purpose of parole reconsideration. Neither of these activities is required by statute. *See* O.C.G.A. § 42-9-43(b) and (c). Of course, circumstances may warrant that one or both of these techniques be employed.

The Eleventh Circuit correctly assumes that at the initial parole consideration a number of factors may be considered to determine the inmate's eligibility for parole. If parole is denied at that initial consideration, however, contrary to the Eleventh Circuit's assumption, the inmate does not then enter into a period of parole "ineligibility." On the contrary, an inmate is "eligible" for parole at any time if he can show, to the Board's satisfaction, that parole would be in the best interests of both the individual and society as a whole. A significant change in circumstances can trigger a reconsideration at any time.

The Board's system for scheduling parole reconsiderations existed prior to any change in Board Rule Ch. 475-3-.05(2) and still exists at present. The only change in the Board's rules has been to lengthen the *maximum* period of time between parole reconsiderations. No minimum has ever been set. *See* Rule 475-3-.05(2) of the Rules of the State Board of Pardons and Paroles.

Contrary to the Eleventh Circuit's assumption, parole reconsiderations are not on a rigid eight-year schedule. Rather, the appropriate time for a parole reconsideration is determined by the individual inmate's actions or by

circumstances judged on a case-by-case basis. Parole being a purely discretionary exercise of executive power, such a case-by-case determination is only appropriate. *See Damiano v. Florida Parole and Probation Commission*, 785 F.2d 929 (11th Cir. 1986).

As the court noted in *Damiano*, postponement of parole is "merely a disappointment rather than a punishment. . . . " *Id.* at 939. Such a disappointment does not rise to the level of a constitutional violation, nor does it increase the punishment for the crime. No state legislation exists which would indicate that changing the maximum intervals between parole reconsiderations constitutes an increase in punishment. This is especially true since, as described above, the inmate does not enter into a period of "ineligibility" for parole in the interim.

C. *RODRIGUEZ V. UNITED STATES PAROLE COMMISSION* IS DISTINGUISHABLE FROM THE INSTANT ACTION.

The case relied upon by the Eleventh Circuit, *Rodriguez v. United States Parole Commission*, 594 F.2d 170 (7th Cir. 1979), concerned an amendment to a statute effectively eliminating a previously existing possibility of parole. In a decision concerning parole eligibility, the Supreme Court stated "a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the ex post facto clause . . . of whether it imposed a greater or more severe *punishment* than was prescribed by law at the time of the . . . offense. . . . " *Warden v. Marrero*, 417 U.S. 653, 662-63 (1974). *Marrero* and *Rodriguez* concerned repealer

of *all* possibility for parole available at the time of the commission of the crime. Nothing in either case, however, indicates that a change in the timetable for considering inmates for parole would have the same implication with respect to the ex post facto clause.

As noted by the Eleventh Circuit, two other courts have determined that a mere change in the frequency of parole hearings did not implicate a violation of the ex post facto clause. *In re: Jackson*, 39 Cal. 3rd 464, 703 Pac.2d 100, 216 Cal. Rptr. 760 (1985) and *Gunter v. State*, 298 S.C. 113, 378 S.E.2d 443 (1989). Both courts concluded that since there had been no elimination of the parole available at the time of the plaintiffs' crimes, there was no constitutional violation.

Given the above, the Eleventh Circuit's characterization of the difference between the circumstances in *Rodriquez* and the instant case as "incidental" is incorrect. There is a substantial difference, from a constitutional perspective, between the complete elimination of opportunity for parole and an alteration in the rules concerning when parole consideration will take place.

CONCLUSION

For all the above and foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to review the decision by the Eleventh Circuit Court of Appeals as the Eleventh Circuit Court of Appeals ignored the precedent of this Court and ruled erroneously.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

C. T. ATKINS, et al	JUDGMENT IN A CIVIL CASE
V	CASE NUMBER
WAYNE SNOW, JR.	1:88-cv-2421-RCF

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiffs C. T. AKINS, MICHAEL SCHROEDER and JAY FATE take nothing, that the action be dismissed, and that the defendant WAYNE SNOW, JR. recover of the plaintiffs his costs of action.

FILED IN CLERK'S OFFICE
JUNE 29, 1989
ENTERED ON DOCKET
JULY 5, 1989

LUTHER D. THOMAS, CLERK
BY: /s/ Evelyn Y. Brown
Deputy Clerk

July 5, 1989
Date

Luther D. Thomas
Clerk

/s/ Evelyn Y. Brown
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

C. T. AKINS, et al.	:	1:88-cv-2421-RCF
vs.	:	FILED JUN 29 1989
WAYNE SNOW, JR.	:	

ORDER

This action is before the court on cross motions for summary judgment and plaintiffs' motion to strike.

BACKGROUND

Plaintiffs in this action are C.T. Akins, Michael Schroeder, and Jay Fate, inmates at the Georgia State Prison in Reidsville, Georgia. Defendant is the chairman of the State Board of Pardons and Paroles [the board].

Plaintiffs filed this action seeking declaratory judgment and injunctive relief. Plaintiffs contend postponement of reconsideration of their denials of parole by defendant violates the due process clause and the ex post facto clause because defendant is applying the revised Rule 475-3-.05, para. 2, ["revised rule"] of the Rules of State Board of Pardons and Paroles. The revised rule provides that "[r]econsideration of those inmates serving life sentences who have been denied parole shall take place at least every eight years." Revised rule, attached to plaintiffs' motion for summary judgment, exhibit A, p. 8. Prior to the enactment of the revised rule, after a denial of parole, the board would reconsider the inmate's eligibility every year. The revised rule became effective February 1, 1985. Plaintiffs were all incarcerated for crimes occurring prior to 1985 and contend the board should

consider their eligibility for parole under the rules in effect at the time their crimes were committed (i.e. reconsideration of parole denial each year after the initial denial). Plaintiffs contend the revised rule increases their punishment and deprives them of their right to be reviewed for parole every year. In response, defendant contends plaintiff has failed to state cognizable a claim for relief.

Under Fed. R. Civ. P. 56 the court should grant a motion for summary judgment where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." The Supreme Court has clarified the standard for granting summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986). The movant carries his burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2554. The nonmovant, however, bears the burden of making a sufficient showing establishing the existence of each element essential to his case, and on which he will bear the burden of proof at trial. *Id.* at 322, 106 S.Ct. at 2553. "The mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512. The court, resolving all reasonable doubts in favor of the nonmovant, must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Id.*

The material facts are not in dispute. Each of the plaintiffs served the seven-year, statutory time for parole

review, came up for review and was denied parole. Under the revised rule in issue, the board may refuse to reconsider plaintiffs for parole for eight years following their initial denials.

The court will grant defendant's motion for summary judgment. Plaintiffs have neither a liberty interest nor a protectable expectation of release under the applicable rules. *See Fuller v. Georgia State Board of Pardons and Paroles*, 851 F.2d 1307, 1309 (11th Cir. 1988) ("no entitlement or liberty interest in parole was created by Georgia statute."). Neither the revised rule nor its predecessor creates any expectation of release. At most the rule creates an expectation of *review;* the court declines to deem that expectation to be a liberty interest under the fourteenth amendment. Thus, plaintiffs have failed to assert any claim that defendant violated their due process rights.

Likewise, plaintiffs have not stated a claim for violation of the ex post facto clause. The ex post facto clause, U.S. Const. art. 1, § 9, cl. 3, prohibits laws that are criminal, retrospective, and "disadvantageous to the offender because [they] may impose greater punishment." *Dufresne v. Baer*, 744 F.2d 1543, 1546 (11th Cir. 1984), *cert. denied*, 474 U.S. 817, 106 S.Ct. 61 (1985). The Eleventh Circuit has expressly ruled that the denial or postponement of parole is "merely a disappointment rather than a punishment. . . ." *Damiano v. Florida Parole and Probation Commission*, 785 F.2d 929, 933 (11th Cir. 1986), *cert. denied*, 108 S.Ct. 1015 (1988). As a matter of law, the postponement of reconsideration for parole is not a punishment subject to the ex post facto clause.

Accordingly, defendant's motion for summary judgment is GRANTED. The Clerk is DIRECTED to enter final judgment in defendant's favor. Plaintiffs' motion to strike is DENIED.

SO ORDERED, this 28 day of June, 1989.

/s/ Richard C. Freeman
RICHARD C. FREEMAN
UNITED STATES
DISTRICT JUDGE

APPENDIX B

C.T. AKINS, Jay M. Fate,
Plaintiffs-Appellants,

Michael Schroeder, Plaintiff,

v.

Wayne SNOW, Jr., Chairman State Board of Pardons & Paroles,

Defendant-Appellee,

No. 89-8622.

United States Court of Appeals,
Eleventh Circuit.

Feb. 7, 1991.

Inmates brought § 1983 action alleging that application by Board of Pardons and Paroles of amended rules and regulations to their cases violated their substantive due process rights. The United States District Court for the Northern District of Georgia, No. 1:88-cv-2421-RCF, Richard C. Freeman, J., denied relief, and inmates appealed. The Court of Appeals, Cox, Circuit Judge, held that denial of annual parole reconsideration hearing, pursuant to amendment of board rule to provide for reconsideration hearing at least every eight years after denial of parole, violated ex post facto clause with respect to inmates who, when their crimes were committed, were entitled to annual reconsideration hearings.

Reversed and remanded.

Appeal from the United States District Court for the Northern [District] of Georgia.

Before EDMONDSON and COX, Circuit Judges, and WISDOM*, Senior Circuit Judge.

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* Honorable John Minor Wisdom, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

COX, Circuit Judge:

I. FACTS AND PROCEDURAL HISTORY

In October 1988, C.T. Akins and Jay Fate[1] filed this action under 42 U.S.C. § 1983 seeking declaratory and injunctive relief or in the alternative compensatory and punitive damages, against Wayne Snow, chairman of the Georgia State Board of Pardons and Paroles (the Board).[2] As the basis for their section 1983 action Akins and Fate allege that the Board's application of the 1986 parole rules and regulations to their cases violates their substantive due process rights under the Fourteenth Amendment and the ex post facto clause of the United States Constitution, art. I, § 10, cl. 1.

Both appellants in this case are inmates serving life terms at the Georgia State Prison in Reidsville, Georgia. The crime for which Akins was convicted was committed in 1972; the crime for which Fate was convicted was committed in 1977. When these crimes were committed, the Board's rules required the Board to initially consider an inmate serving a life term for parole after serving seven years of his life sentence.[3] If the Board denied an

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[1] Michael Schroeder was also a party to the suit, but he did not appeal.

[2] Because Akins and Fate challenge the parole decision process, specifically their eligibility for parole, and not the denial of parole, they may properly bring a claim under § 1983 without first bringing a habeas corpus claim and exhausting their state remedies. *See Gwin v. Snow*, 870 F.2d 616 (11th Cir.1989). Snow makes no argument to the contrary.

[3] Georgia State Board of Pardon and Paroles rules and regulations (Board rules), ch. 475-3.-06(3) (1972).

inmate parole at this initial hearing, the rules required the Board thereafter to hold an annual hearing to reconsider its parole decision.[4]

In September 1980, the Board held Akins's initial parole hearing and denied him parole. The Board reconsidered Akins for parole annually through 1986. In September 1986, the Board, pursuant to new rules, scheduled Akins for another parole reconsideration hearing in 1994.[5] These new rules only require the Board to reconsider an inmate for parole once every eight years after the denial of parole.[6]

Fate received his first parole consideration hearing in July 1984. The Board refused to grant him parole at that time and deferred reconsideration of this decision until the following year. At the subsequent reconsideration hearing the Board again denied Fate parole but this time, pursuant to the new rules, did not schedule another reconsideration hearing until 1993.

After the Board failed to hold a number of annual reconsideration hearings for Akins and Fate, they filed this action alleging a due process and ex post facto clause violation. The district court, in ruling on cross-motions for summary judgment, denied Akins's and Fate's motion but granted Snow's summary judgment motion. On the due process claim, the court held that Akins and Fate did not have, under the original or revised rules, a "liberty interest nor a protectable expectation of release."

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[4] Board rules, ch. 475-3-.05(2) (1969).

[5] Board rules, ch. 475-3-.05(2) (1986).

[6] *Id.*

R.1-13-3. On the ex post facto claim, the court held that "as a matter of law, the postponement of reconsideration for parole is not a punishment subject to the ex post facto clause." *Id.* The district court based its ex post facto ruling upon *Damiano v. Florida Parole and Probation Commission*, 785 F.2d 929 (11th Cir.1986), in which this court held that parole postponement is "merely a disappointment rather than a punishment. . . . " *Id.* at 933.[7] Akins and Fate only appeal the district court's ruling relating to their ex post facto claim.

II. DISCUSSION

An appellate court reviews summary judgment decisions *de novo*. *Tackitt v. Prudential Ins. Co.*, 758 F.2d 1572, 1574 (11th Cir.1985). Summary judgment is proper if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c).

The Constitution provides that "[n]o State shall . . . pass any . . . ex post facto Law. . . . " U.S. Const. art. I, § 10, cl. 1. At the time the Constitution was drafted, the phrase "ex post facto law" was a term of art with a well-established meaning. *See Calder v. Bull*, 3 U.S. (Dall.) 386, 1 L.Ed. 648 (1798). Justice Chase's opinion in *Calder v. Bull*, 3 U.S. (Dall.) 386, 1 L.Ed. 648 (1798), identified several legislative acts that clearly implicated the core

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[7] We find the court's reliance on *Damiano* misplaced. *Damiano* involved a change in the factors used to determine if a prisoner would be released on parole. *Id.* at 931. *Damiano* did not involve an alleged change in parole eligibility.

concerns of the various ex post facto clauses that existed at the time of the Constitution's framing. One such legislative act he noted was: "Every law that *changes the punishment,* and *inflicts a greater punishment,* than the law annexed to the crime when committed." *Id.* at 390, 1 L.Ed. at 650 (opinion of Chase, J.) (emphasis in original). The Supreme Court's ex post facto rulings have been faithful to the original principle that "every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed," violates the ex post facto provision. *See Miller v. Florida,* 482 U.S. 423, 429, 107 S.Ct. 2446, 2450, 96 L.Ed.2d 351 (1987); *Weaver v. Graham,* 450 U.S. 24, 28, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981); *Dobbert v. Florida,* 432 U.S. 282, 292, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977); *Lindsey v. Washington,* 301 U.S. 397, 401, 57 S.Ct. 797, 799, 81 L.Ed. 1182 (1937); *Rooney v. North Dakota,* 196 U.S. 319, 324-325, 25 S.Ct. 264, 265-266, 49 L.Ed. 494 (1905); *In re Medley,* 134 U.S. 160, 171, 10 S.Ct. 384, 387, 33 L.Ed. 835 (1890); *Cummings v. Missouri,* 71 U.S. 277, 325-326, 18 L.Ed. 356, 363-364 (1867); *Calder v. Bull,* 3 U.S. (Dall.) 386, 390, 1 L.Ed. 648, 650 (1798).

Before addressing the substantive issue of whether the Board's action violates the ex post facto clause, three preliminary issues must be discussed. First, are the Board's rules laws within the meaning of the ex post facto clause? Second, are parole reconsideration hearings a part of parole eligibility? Third, are the ex post facto clause's restrictions applicable to a change in parole eligibility?

Regarding the first preliminary issue, the Georgia legislature has delegated to the Board the authority to enact "rules and regulations" concerning parole. Ga.Code

Ann. § 77-525 (Harrison 1969); Ga.Code Ann. § 42-9-45 (1989). This delegation mandates that the Board's rules and regulations "contain an eligibility requirement for parole which shall set forth the time when the automatic initial consideration for parole of inmates under the jurisdiction of the Department of Corrections shall take place and also the times at which periodic reconsideration thereafter shall take place." *Id.*

If the Georgia legislature had passed the parole reconsideration rule at issue, the rule clearly would be a law and the ex post facto clause would obviously apply. The inquiry is whether the Board's rule is the equivalent of a law for ex post facto purposes.

The effect of the legislature's delegation is to grant the Board quasi-legislative power. The Board's rules and regulations have the force and effect of law. Since the legislature delegated to the Board the power to enact rules and regulations concerning parole reconsideration, the rules or regulations enacted by the Board are subject to the ex post facto clause's prohibitions. Decisions in other circuits, involving similar circumstances, support this conclusion. *See Rodriguez v. United States Parole Comm'n*, 594 F.2d 170, 174 (7th Cir.1979) ("This rule must be viewed as tantamount to a statute for the purpose of determining whether its application to Rodriguez runs afoul of the *ex post facto* clause."); *Love v. Fitzharris*, 460 F.2d 382, 385 (9th Cir.1972), *vacated*, 409 U.S. 1100, 93 S.Ct. 896, 34 L.Ed.2d 682 (1973) (a state parole authority's change in the interpretation of a parole eligibility provision is subject to ex post facto constraints because the agency's interpretation had the effect of law).

The second preliminary issue concerns whether a parole reconsideration hearing is a part of a prisoner's parole eligibility. Under the Georgia parole system, an inmate serving a life sentence becomes eligible for parole consideration after serving seven years of his sentence. This means that the inmate is given a parole consideration hearing,[8] and the Board then determines if he is suitable for release based on a number of factors. If the inmate is denied parole at this initial hearing the Board schedules a parole reconsideration hearing at a later date.[9] If the inmate is denied parole at the reconsideration hearing, the Board schedules the inmate for another reconsideration hearing at a later date. Since the Board is required to hold some type of parole reconsideration hearing before granting parole,[10] an inmate is effectively ineligible for parole between two parole reconsideration hearings. Because an inmate is not paroled without a parole reconsideration hearing, the hearing must be considered an essential part of parole eligibility.

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[8] We use the terms parole consideration hearing and parole reconsideration hearing to include the Board's interview of the inmate, the Board's investigation of the inmate, the Board's discussion of the inmate and the Board's subsequent decision whether the inmate should be paroled. *See, e.g.*, Ga.Code Ann. § 42-9-43 (1989).

[9] The only distinction between a parole consideration hearing and a parole reconsideration hearing is that a parole consideration hearing is the term used to describe an inmate's initial parole hearing and a parole reconsideration hearing is the term used to describe any subsequent parole hearing.

[10] *See* Ga.Code Ann. §§ 42-9-41, 42-9-42, and 42-9-43.

The conclusion that a parole reconsideration hearing is an essential part of parole eligibility under Georgia's parole system is supported by the language of the statute delegating to the Board the power to enact rules and regulations concerning parole. The statute provides that "[s]uch rules and regulations shall contain *an eligibility requirement for parole which shall set forth* the time when the automatic initial consideration of inmates . . . shall take place and also *the times at which periodic reconsideration thereafter shall take place. . . .*" Ga.Code Ann. § 77-525 (Harrison 1969) (emphasis added); *see also* Ga.Code Ann. § 42-9-45 (1989). This language indicates that the legislature considers a parole reconsideration hearing an essential and important part of parole eligibility.

The Seventh Circuit's decision in *Rodriguez v. United States Parole Commission*, 594 F.2d 170 (7th Cir.1979), also supports our conclusion. Rodriguez was convicted in 1977 for crimes he committed in 1974 and 1975. He was sentenced to the statutory maximum of two years, which made him technically eligible for immediate parole. In 1974 and 1975, when Rodriguez committed his crimes, the applicable parole regulations required that prisoners receive an immediate initial hearing, at which almost no one was ever granted parole, and a subsequent hearing after serving one-third of their sentence. After Rodriguez committed his crimes, the applicable parole rules were amended. The amended parole rules eliminated the additional hearing at the one-third point and replaced it with additional review hearings that were to occur not less frequently than eighteen months after the initial hearing. The amended rules effectively prevented Rodriguez from

being paroled since almost no one was paroled at the initial hearing.

The *Rodriguez* court held that such a change in parole hearings violated the ex post facto clause. The court noted that "[a]t the time of the offense for which Rodriguez was convicted, any 'punishment' prescribed included such an opportunity for parole release. The retroactive elimination of this opportunity is plainly to his 'substantial disadvantage.' " *Id.* at 175 (footnotes omitted). The court concluded that "deprivation of all opportunity to be released on parole . . . comes within the scope of [the] clause." *Id.* In reaching this conclusion, the court reasoned that "[e]ligibility in the abstract is useless; only an unusual prisoner could be expected to think that he is not suffering a penalty when even though he is eligible for parole and might be released if granted a hearing, he is denied that hearing." *Id.* at 176. This language demonstrates the *Rodriguez* court's belief that a parole hearing is an essential element of parole eligibility. Therefore, *Rodriguez* implies that without the opportunity for a parole hearing an inmate is not, in any realistic meaning of the term, eligible for parole.

We realize that *Rodriguez* involved a change that effectively eliminated all opportunity for parole release, but we think the specific disadvantage is incidental. The key to the court's conclusion was that Rodriguez was deprived of an opportunity for parole that existed prior to the alteration of the parole rules. *See Watson v. Estelle*, 859 F.2d 105, 109 (9th Cir.1988), *vacated*, 886 F.2d 1093 (9th Cir.1989).

The third preliminary issue concerns whether the ex post facto clause applies to a change in parole eligibility. The Supreme Court never has held that parole eligibility is part of a prisoner's sentence subject to the prohibitions of the ex post facto clause. The Court has commented in *dicta* that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present a serious question under the ex post factor clause. . . ." *Warden v. Marrero*, 417 U.S. 653, 663, 94 S.Ct. 2532, 2538, 41 L.Ed.2d 383 (1974) (citations omitted). This court's predecessor implied that parole eligibility is a part of a prisoner's sentence by stating any "official po[s]t-sentence action that delays eligibility for supervised release release runs afoul of the ex post facto proscription." *United States ex rel. Graham v. United States Parole Comm'n*, 629 F.2d 1040, 1043 (5th Cir.1980) (quoting *Shepard v. Taylor*, 556 F.2d 648, 654 (2nd Cir.1977).[11] Other courts also have held that parole eligibility is part of the sentence imposed as punishment for a crime and therefore subject to the prohibitions of the ex post factor clause. *See Fender v. Thompson*, 883 F.2d 303, 306 (4th Cir.1989) (retrospective application of a statute changing parole eligibility would substantially alter the consequences attached to a crime already completed and therefore change the punishment for prisoners who committed crimes before the statute's enactment); *Schwartz v. Muncy*, 834 F.2d 396, 398 n. 8 (4th Cir.1987) ("parole eligibility is part of the law annexed to the crime at the time of a person's

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[11] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

offense"); *Beebe v. Phelps*, 650 F.2d 774, 777 (5th Cir. Unit A 1981) ("parole eligibility is considered an integral part of any sentence"); *Rodriguez v. United States Parole Comm'n*, 594 F.2d 170, 176 (7th Cir.1979) ("the possibility of parole [is] an element of punishment"); *Breest v. Helgemoe*, 579 F.2d 95, 102 (1st Cir.), *cert. denied*, 439 U.S. 933, 99 S.Ct. 327, 58 L.Ed.2d 329 (1978) ("parole eligibility constitutes part of punishment"). We agree with these holdings; for ex post facto purposes, parole eligibility must be considered part of any sentence.

Having concluded that the Board's rules are "laws" within the meaning of the ex post facto clause; that parole reconsideration hearings are an essential part of parole eligibility; and that parole eligibility is part of a sentence for ex post facto purposes, we now consider whether the Board's action in amending its rules regarding parole reconsideration hearings violates the ex post facto clause. Snow argues that the amended rules do not violate the clause because Akins and Fate do not have any entitlement or vested right to parole. Appellee's Brief at 4. Snow misconstrues the scope of the ex post facto clause. The Supreme Court in *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), rejected the contention that the ex post factor clause is violated only when the law in question affects a vested interest. The *Weaver* Court stated that "a law need not impair a 'vested right' to violate the ex post facto prohibition . . . The presence or absence of an affirmative, enforceable right is not relevent . . . to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." *Id.* at 29-30, 101 S.Ct. at 964-65 (footnote omitted).

The Supreme Court has developed a two-pronged analysis in evaluating a law under the ex post facto clause. The first prong requires that the law be "retrospective, that is, it must apply to events occurring before its enactment. . . . " *Weaver*, 450 U.S. at 29, 101 S.Ct. at 964 (1981) (footnote omitted). The second prong requires that the law "disadvantage the offender affected by it." *Id.* (footnote omitted).

In determining whether a law is retrospective, a court must look to the date when the crime was committed. *Weaver*, 450 U.S. at 31, 101 S.Ct. at 965. If the law alters the legal consequences of an act after the act is completed, the law is retrospective. *Id.* Snow does not dispute that the Board's rules are being retrospectively applied to Akins and Fate. Akins committed his crime in 1972 and Fate committed his crime in 1977. In both years the Board's rules required an annual reconsideration hearing. In 1986, the Board amended its rules to provide for a reconsideration hearing at least every eight years after a denial of parole. By applying the new rules to Akins and Fate, the Board effectively altered the consequences of their crimes after they were completed.

The second prong of the Supreme Court's test requires us to determine whether the Board's amended rules disadvantage Akins and Fate. The Board's rule "need not technically increase the punishment" attached to Akins's and Fate's crime but only "substantially disadvantage" Akins's and Fate's parole eligibility. *Lindsey v. Washington*, 301 U.S. 397, 401-02, 57 S.Ct. 797, 799, 81 L.Ed. 1182 (1937).

The Board's 1986 rules alter the period between parole reconsideration hearings that existed when Akins and Fate committed their crimes. At the time of Akins's and Fate's crimes, the Board's rules provided the opportunity for a parole reconsideration hearing every year after a denial of parole. Now the Board's rules provide the opportunity for a parole reconsideration hearing only once every eight years after a denial of parole. Because we have already concluded that a parole reconsideration hearing is an essential part of parole eligibility under Georgia's parole system, the Board's alteration of the period between parole reconsideration hearings also alters a prisoner's parole eligibility. The Board, in altering the period between a parole reconsideration hearing and a subsequent parole reconsideration hearing, has increased the time an inmate must spend in prison before he can again become eligible for parole. This change in parole eligibility substantially disadvantages a prisoner.[12]

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[12] The courts that have dealt with the issue of a change in frequency of parole hearings are divided as to whether such a change can violate the ex post facto clause. *Compare Watson v. Estelle*, 859 F.2d 105 (9th Cir.1988), *vacated*, 886 F.2d 1093 (9th Cir.1989) (change in parole hearing date violates ex post facto clause); *Rodriguez v. United States Parole Comm'n*, 594 F.2d 170 (7th Cir.1979) (change in frequency of parole hearings violates ex post facto clause); *Upshaw v. Klincar*, No. 89-3133, 1990 WL 114476 (N.D.Ill. July 30, 1990) (WESTLAW, Allfeds library, Dist file) (change in parole hearings can violate ex post facto clause); *Lett v. Klincar*, 151 Ill.App.3d 783, 104 Ill.Dec. 422, 502 N.E.2d 1082 (1986) (elimination of annual parole hearing violates ex post fact clause); *with In re Jackson*, 39 Cal.3d 464, 703 P.2d 100, 216 Cal.Rptr. 760 (1985) (change in frequency of parole hearings does not violate ex post facto clause); *Gunter v. State*, 298 S.C. 113, 378 S.E.2d 443 (1989) (change from annual to biannual parole hearing does not violate ex post facto clause).

If the Board had extended the date of an inmate's initial parole hearing the change would violate the ex post facto clause. *See Schwartz v. Muncy*, 834 F.2d 396 (4th Cir. 1987). By making such a change the Board would require an inmate to spend more time in prison before he became eligible for parole. There is no principled distinction between changing the date of the initial hearing and changing the period between parole reconsideration hearings. Both substantially disadvantage a prisoner's parole eligibility and therefore his opportunity for parole.

The Board argues that even if the new rule disadvantages Akins and Fate by changing their parole eligibility, the change is a procedural one not prohibited by the ex post facto clause. The Supreme Court has held that even a retrospective law that is disadvantageous will not violate the clause if the change concerns "legislative control of remedies and modes of procedures which do not affect matters of substance." *Dobbert v. Florida*, 432 U.S. 282, 293, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977). However, the Court has noted that the distinction between procedural and substantive changes is often quite elusive. *Miller v. Florida*, 482 U.S. 423, 433-35, 107 S.Ct. 2446, 2453, 96 L.Ed.2d 351 (1987). A law that is seemingly procedural will still violate the clause if the law alters a substantive right. *Weaver*, 450 U.S. at 29 n. 12, 101 S.Ct. at 964 n. 12 (1981).

In *Rodriguez v. United States Parole Commission*, 594 F.2d 170 (7th Cir.1979), the Seventh Circuit rejected the argument that the change in the date of a parole reconsideration hearing was only a procedural change not subject to the ex post facto clause. The court stated that

"neither the right to a meaningful hearing nor the abrogation of the right is 'procedural' as that term is used in *ex post facto* law." *Id.* at 175 n. 7. The change "did not simply alter 'the methods employed' . . . in determining whether an eligible prisoner would be released on parole." *Id.* (citing *Dobbert v. Florida*, 432 U.S. 282, 293-94, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977)).

We agree with the *Rodriguez* court's reasoning and conclude that the Board's new rule, regarding the date of reconsideration hearings, is not merely a procedural change. The elimination of a parole reconsideration hearing does not simply alter the methods employed to determine whether an otherwise eligible inmate is granted parole. A parole consideration hearing is both in law and in practice an important component of a prisoner's parole eligibility. The change is a substantive one that effectively disadvantages an inmate.

We therefore hold that the elimination of an annual parole reconsideration hearing can as a matter of law violate the ex post facto clause.

The district court found that there was no genuine issue of material fact and therefore that Snow was entitled to judgment as a matter of law. The record establishes that at the time Akins and Fate committed their crimes, the Board's rules required that Akins and Fate be given an annual reconsideration hearing after a denial of parole. The record also establishes that since 1986 Akins and Fate have not had an annual reconsideration hearing. Based on these facts and our discussion of the law, we find that the Board's actions violated the ex post facto

clause. Therefore, Akins and Fate were entitled to summary judgment as a matter of law and the district court erred by not granting their summary judgment motion.[13]

III. CONCLUSION

We REVERSE the district court's grant of summary judgment for Snow and REMAND the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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[13] Akins and Fate are entitled to appropriate relief. The district court has not yet addressed what relief is appropriate in this case, and therefore we do not address that issue.

APPENDIX C

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8622

C.T. AKINS,
JAY M. FATE,

Plaintiffs-Appellants,

MICHAEL SCHROEDER,

Plaintiff,

versus

WAYNE SNOW, JR., Chairman
State Board of Pardons & Paroles,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

FILED APR 09 1991

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion February 7, 1991, 11th Cir., 19___, ___F.2d___).

Before: EDMONDSON and COX, Circuit Judges, and WISDOM*, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active

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* Honorable John Minor Wisdom, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Emmett R. Cox
UNITED STATES CIRCUIT JUDGE

90 - 1730

Supreme Court, U.S.
FILED

No.

SUPREME COURT OF [illegible]

October [illegible],

WAYNE SNOW, JR., CHAIRMAN,
Georgia State Board of Pardons and Paroles,

Petitioner,

C[illegible]

[illegible] of Respondents [illegible]

[illegible]

[illegible]

BEST AVAILABLE COPY

No._____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

WAYNE SNOW, JR., CHAIRMAN,
Georgia State Board of Pardons and Paroles,

Petitioner,

v.

C. T. AKINS and JAY M. FATE,

Respondents

Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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Statement of the Case

By order of the Honorable J. L. Edmondson, Judge, United States Court of Appeals for the Eleventh Circuit, dated April 16, 1990, the undersigned, Howard O. Hunter, was appointed as counsel for the respondents C. T. Akins and Jay M. Fate pursuant to Eleventh Circuit Addendum Five to file a supplemental brief on their behalf, to present oral arguments, and to represent them in further proceedings before that Court. The respondents were granted leave to proceed in forma pauperis by both the United States District Court for the Northern District of Georgia and the United States Court of Appeals for the Eleventh Circuit.

The Petitioner's Statement of the Case outlines the general history of the case. There are certain additional facts pertinent to the disposition of the Petition.

There is no dispute about the central facts of this case. The respondents Akins and Fate are both inmates at the Georgia State Prison in Reidsville, Georgia. Each is serving a life sentence. Akins was sentenced in 1973 for a crime committed in 1972. Fate was convicted of a crime committed in 1977 and

sentenced that same year. At the time each crime was committed the rules of the Georgia State Board of Pardons and Paroles (the "Board") provided for first consideration of those serving life sentences after the completion of seven years in prison.[1] The seven year time period for initial consideration has not been changed. When respondents were sentenced the Board's rules provided that a prisoner serving a life term would be eligible for parole consideration annually after an initial denial. Akins was denied parole in 1980 when he was first eligible for consideration. He was reconsidered annually from 1980 to 1986 and denied each time. Fate's initial consideration came in 1984. He was denied parole and was considered again in 1985 when he also was denied parole.

In 1985 the Board amended the rule on eligibility for reconsideration after an initial denial to provide that "Reconsideration of those inmates serving life sentences who have been denied parole shall take place at least <u>every eight years</u>."[2] In 1986 both Akins and Fate were deferred from

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1 See Rule 475-3-.06, Rules of the Georgia Board of Pardons and Paroles.

2 Rule 475-3-.05, paragraph 2, Rules of the Georgia Board of Pardons and Paroles.

eligibility to be reconsidered under the new rule for up to eight years.

The petitioner introduces a discussion of facts on pages 8-11 of the Petition that are not part of the undisputed record in this case on which the decisions of the District Court and the Eleventh Circuit are based. See Order of the District Court, Appendix 2-5, Petition. Although the petitioner's discussion ultimately supports the respondents' position as made clear in the argument which follows, it is important to note that there is a limited record of undisputed facts and that the controversy concerns a single change in Georgia's rules on mandated eligibility for parole reconsideration after an initial review and denial.

The respondents argued in the courts below that the change in the Board's rules from a requirement that they be eligible for reconsideration annually to a requirement that they be eligible for reconsideration every eight years was a substantial change in the nature of their punishment in violation of the ex post facto clause of the United States Constitution, Article I, section 9, clause 3. The respondents

made certain other claims and advanced certain other arguments in the District Court. That Court granted summary judgment to the petitioner on all claims. On appeal to the Eleventh Circuit the sole issue was whether the Board's rule change on eligibility for parole reconsideration violated the ex post facto clause. The Court of Appeals held, in a unanimous decision, that the rule change did violate the ex post facto clause and reversed the decision of the District Court.

REASONS FOR DENYING THE WRIT

A. THE DECISION OF THE ELEVENTH CIRCUIT IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL AND IS NOT CONTRARY TO THE RECENT DECISION OF THIS COURT IN COLLINS V. YOUNGBLOOD, 497 U.S. _____, 110 S. CT. 2715, 111 L. ED. 2d 30 (1990).

1. The change in the rule governing eligibility for consideration for parole was an increase in punishment within the meaning of Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648 (1798).

In Collins v. Youngblood this Court reaffirmed the understanding of the ex post facto clause set forth in the 1798 opinion in the case of Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648 (1798). The ex post facto clause is violated by "Every law that changes the punishment, and inflicts a greater punishment,

than the law annexed to the crime, when committed." Id., 3 Dall. at 390.

There is no dispute that when the respondents committed the crimes for which they were convicted, the Board's rules provided that prisoners serving life sentences would be eligible to be considered for parole after seven years, and, if denied, annually thereafter. In 1985 the rule on eligibility for reconsideration was changed to the substantial detriment of the respondents.[3] When they committed the crimes for which they received life sentences the Board was required to reconsider them for parole annually after an initial denial. Now the Board is required to consider them no more frequently than every eight years. The respondents have made no claim of a right to parole or of a "liberty interest" in parole. Their position, and that of the Eleventh Circuit, is that the 1985

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[3] Apparently there was a change in 1979 for mandated reconsideration every three years, but the record indicates that the respondents received annual reconsideration until the 1985 rule change. In any event the rule in effect at the relevant time required annual reconsideration.

change in the Board's rule on eligibility for reconsideration after an initial denial was a substantial increase in their punishment.

It has long been accepted that parole eligibility is part of the sentence for a crime and that disadvantaging retrospective changes in parole eligibility rules violate the ex post facto clause. See Schwartz v. Muncy, 834 F. 2d 396 (4th Cir. 1987); Burnside v. White, 760 F. 2d 217 (6th Cir. 1985); Beebe v. Phelps, 650 F. 2d 774 (5th Cir. 1981); Shepard v. Taylor, 556 F. 2d 648 (2d Cir. 1977); Rodriguez v. United States Parole Commission, 594 F. 2d 170 (7th Cir. 1979). See also Lindsey v. Washington, 301 U.S. 397 (1937). In the case of Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 658 (1974) this Court stated:

> Although, of course, the precise time at which the offender becomes eligible for parole is not part of the sentence, ... , it is implicit in the terms of the sentence. And because it could not be seriously argued that sentencing decisions are made without regard to the period of time a defendant must spend in prison before becoming eligible for parole, or that such decisions would not be drastically affected by a substantial change in the proportion of the sentence required to be served before becoming eligible, parole eligibility can be properly viewed as being determined - and deliberately so - by the sentence of the District Judge.

In dictum this Court went on to state that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the ex post facto clause ... of whether it imposed a 'greater or more severe punishment than was prescribed by law at the time of the ... offense.'" 417 U.S. at 663, citing Rooney v. North Dakota, 196 U.S. 319, 325 (1905).

The petitioner argues that parole eligibility rules are not part of the sentence and relies on two state court decisions: In re Jackson, 39 Cal.3d 464, 703 P.2d 100, 216 Cal. Rptr. 760 (1985) and Gunter v. State, 298 S.C. 113, 378 S.E.2d 443 (1989). This reliance is misplaced. Jackson committed a violent crime in California in 1961. At that time there was no guarantee as to the frequency of parole consideration. The parole board had the discretion to consider any prisoner after six months of a sentence. California case law subsequently required "periodic" consideration. In re Schoengarth, 66 Cal.2d 295, 57 Cal. Rptr. 600, 425 P.2d 200 (1967). In 1972 the parole board instituted a policy of annual reconsideration with the provision that extreme cases might be reviewed every two or three years. In re Minnis, 7 Cal.3d 639, 102 Cal. Rptr. 749, 498 P.2d 997 (1972). The legislature enacted a statute in

1977 providing for annual parole suitability hearings. West's Ann. Cal. Penal Code Section 3041.5(b)(2). This was amended in 1982 to allow the board to do biannual reviews if it was reasonable to expect that parole would not be granted at the next annual review but the board had to state reasons for the delay. West's Ann. Cal. Penal Code section 3041.5(b)(2)(A). The statutory requirement for at least biannual review was more favorable to Jackson than the parole regulations were at the time of his crime in 1961 notwithstanding the relatively modest modification of the 1977 statute by the 1982 amendment. There had been no retrospective increase in punishment.

The Supreme Court of South Carolina in Gunter reviewed an amendment to that state's parole regulations which changed the eligibility of persons convicted of violent crimes from annual reconsideration to biannual reconsideration. The Court held that there was no violation of the ex post facto clause and relied exclusively on In re Jackson for that conclusion. There was a passing reference to Weaver v. Graham, 450 U.S. 24 (1981), but no mention of the many cases holding that changes in eligibility for parole consideration are changes in punishment which violate the ex post facto clause.

The petition also argues that Rodriguez v. United States Parole Commission, 594 F.2d 170 (7th Cir. 1979) does not support the decision of the Eleventh Circuit. To the contrary, the Rodriguez opinion fully supports the Eleventh Circuit's decision in this case. The discussion of Rodriguez in the Petition is not precisely accurate.

Mr. Rodriguez was convicted of perjury and fraud for acts done in 1974 and 1975. He was given a sentence of two years. Rodriguez received a parole hearing after three months under a general policy of early review. He also was subject to a Parole Commission regulation that gave federal inmates the right to a meaningful parole review after serving one-third of a sentence. In late 1977 the Parole Commission amended its regulations to provide that it could schedule re-hearings as late as 18 months after the date of a hearing and denial without regard to the one-third point review. The effect of the change was to delay Rodriguez's second hearing from the eighth month of his sentence (the one-third point) until the twenty-first month. The Court of Appeals for the Seventh Circuit held that this change violated the ex post facto clause because it substantially increased the time before Rodriguez would be eligible to be considered for parole. In his case the

subsequent hearing date was almost at the end of his sentence. The Seventh Circuit reaffirmed the general understanding that parole rules are part of the punishment associated with a crime[4] and went on to discuss the concept of eligibility for consideration:

> Eligibility in the abstract is useless; only an unusual prisoner could be expected to think that he is not suffering a penalty when even though he is eligible for parole and might be released if granted a hearing, he is denied that hearing. 594 F.2d at 176.

The United States Court of Appeals for the Fourth Circuit decided a case in 1989 that bears a number of similarities to this case. Fender v. Thompson, 883 F. 2d 303 (4th Cir. 1989). Fender was found guilty of several serious offenses in 1973 and was sentenced to life imprisonment in Virginia. At that time prisoners serving life sentences became eligible for parole

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4 The Seventh Circuit also referred to Congressional understandings of parole as part of the sentence. See, e.g. H. R. Rep. No. 94-838 (Conf. Report), 94th Cong., 2d Sess. 26, [1976] U.S. Code Cong. & Admin. News, pp. 351, 358; S. Rep. No. 94-369, 94th Cong., 2d Sess. 15-16, [1976] U.S. Code and Cong. & Admin. News, pp. 335, 337, cited 594 F.2d at 175.

consideration after fifteen years.[5] In 1985 the parole statute was amended to provide that "any person sentenced to life imprisonment who escapes from a correctional facility or from any person in charge of his custody shall not be eligible for parole." Va. Code, section 53.1-151(B) (1988). Fender escaped in 1987, but was recaptured. He entered a guilty plea and was sentenced to three years on the escape charge, the sentence to run consecutively with his life sentence. The Department of Corrections then issued an order that Fender was no longer eligible for parole consideration. In a thoughtful opinion by Judge Phillips, the Fourth Circuit found that the application of the amended statute to Fender violated the ex post facto clause.

> [Courts] have unvaryingly refused to permit the retrospective application of new or amended statutes or administrative rules which purported, for example, to alter preexisting criteria for the determination of parole eligibility, Marshall v. Garrison, 659 F. 2d 440, 444-46 (4th Cir. 1981); or revoke accrued 'good time' credits upon the revocation of probationary release granted on the sentence for an offense committed before enactment of the statute ... or, as a practical matter, simply rescind prior parole eligibility altogether .... The principle underlying each of these decisions is that the retrospective application of a statute modifying or revoking parole eligibility would " ... substantially

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5 Va. Code, section 53-251(3) (1970).

> alter the consequences attached to a crime already completed and therefore change the 'quantum of punishment'." 883 F. 2d at 305-06, citing Weaver v. Graham, 450 U.S. 24, 33 (1981) and Dobbert v. Florida, 432 U.S. 282, 293-94 (1977).

Virginia argued that the statute merely imposed an enhanced punishment for the crime of escape and was similar to a recidivist statute. Furthermore, it antedated Fender's escape and, therefore, he was on notice of the possible punishment. The Court rejected Virginia's arguments. The revocation of parole eligibility affected the sentence for the earlier crime, not for the later crime of escape. Fender may have been aware of the consequences of the crime of escape at the time of the later crime, but he was not aware, and could not have been aware, in 1973 that an escape in 1987 would have a direct effect on the sentence he received in 1973.

Judge Phillips relied heavily on Schwartz v. Muncy, 834 F. 2d 396 (4th Cir. 1987). Schwartz was convicted of felonies in Virginia in 1968, 1978 and 1982. The dispute involved his eligibility for parole consideration on the 1978 conviction. In 1979 Virginia enacted a statute that imposed additional restrictions on parole eligibility for repeat offenders. Schwartz was paroled on his 1978 conviction, but his parole was revoked after his arrest and conviction on the 1982 felony.

Under the 1979 law Virginia treated him as a "third offender" for purposes of computing his parole eligibility under both the 1978 and 1982 sentences. The Fourth Circuit held that the application of the 1979 law to his eligibility for parole on his 1978 conviction violated the ex post facto clause. "The proposition for which Schwartz stands, therefore, is this: statutes enacted or amended after a prisoner was sentenced cannot be applied to alter the conditions of or revoke his or her preexisting parole eligibility - notwithstanding that the conduct purportedly triggering application of the statute occurred after its enactment." Fender v. Thompson 883 F. 2d at 306. See also, Gluckstern v. Sutton, 574 A.2d 898 (Md. 1990).

The Fender case deserves close analysis. There was no claim made by Fender of any right to parole. There was no claim of a liberty interest in parole. There was no challenge to the proposition that parole is a matter of discretion for the state. There was no argument that the Parole Board could not take his escape into account in deciding whether he was a good candidate for release on parole. The sole point was that the subsequent law changed the rules on eligibility for consideration by the Board. In 1973 when Fender committed the crimes and was sentenced to life imprisonment, he was eligible

for parole consideration fifteen years later in 1988. An escape attempt in the meantime might weigh heavily against a favorable consideration, but the Board was not prevented from considering him. Virginia then changed the rules, and after his 1987 escape he was no longer eligible for consideration; he had no hope for parole under any circumstances.

The change in this case is not quite as drastic. The respondents have not been denied the opportunity ever to be considered for parole, but the rules have changed to their substantial detriment. When appellants Akins and Fate were sentenced, each was entitled to be considered for parole after seven years and annually thereafter. The Georgia Board subsequently changed the rules to provide that they need not be considered more frequently than every eight years. There is a great deal of difference between mandated consideration annually and mandated consideration once every eight years. It is this change in the rules, applied after the commission of the crime, after conviction, after sentencing, and after service of a substantial portion of their sentences that violates the ex post facto clause.

2. A disadvantaging change in parole eligibility may violate the ex post facto clause even though there is no "liberty interest" in parole.

The respondents have not sought to establish a "liberty interest" in parole nor have they argued that they have a right to demand parole. A change in parole eligibility rules may violate the ex post facto clause even though it does not impair a vested right or a liberty interest. This Court stated in Weaver v. Graham, 450 U.S. 24, 30-31 (1981):

> The presence or absence of an affirmative, enforceable right is not relevant, however, to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offence.

At issue in Weaver was a change by the state of Florida in the method for calculating "gain time" for purposes of parole. "Gain time" is a reward for good behavior that the Florida parole board could use to shorten a sentence. Florida argued that its changes, which reduced the time that could be gained through good behavior, did not violate the ex post facto clause

because: (i) parole is discretionary; (ii) the complainant had not shown that there had been any change in the time he might have to serve; (iii) the complainant's sentence was fifteen years and any reduction was a matter of grace; and (iv) the "gain time" law was not part of the sentence. This Court rejected Florida's arguments because the change affected an important determinant in the actual length of the sentence, a determinant that was known to the trial judge at the time sentence was imposed. Whether or not the complainant ultimately might serve the same length of time was irrelevant. The amendment to the law altered "the consequences attached to a crime already committed." 450 U.S. at 33.

3. The decision by this Court in Collins v. Youngblood to overrule Kring v. Missouri, 107 U.S. 221 (1883) and Thompson v. Utah, 170 U.S. 343 (1898) does not affect the decision of the Eleventh Circuit in this Case.

In Collins this Court reaffirmed Calder v. Bull and overruled two other cases, Kring v. Missouri, 107 U.S. 221 (1883) and Thompson v. Utah, 170 U.S. 343 (1898). The petitioner argues that Collins, therefore, affects the decision of the Eleventh Circuit in this case because the change in the rule of the Georgia board was "procedural." The petitioner is incorrect both as to the effect of this Court's decision to

overrule Kring and Thompson and as to the characterization of the change in the parole eligibility rule applicable to respondents.

The Kring case involved a change in Missouri's procedure for handling guilty pleas to murder charges. This Court adopted an expansive view of the ex post facto clause to find a constitutional violation. The facts of that case have little, if any, relevance to this case. Furthermore, the respondents do not argue that the parole eligibility rule change at issue here falls within the definition of the ex post facto clause adopted in Kring. To the contrary, the rule change amounts to an increase in punishment within the third part of the definition in Calder v. Bull, discussed above.

The question in the Thompson case was whether a reduction in the size of the trial jury from twelve to eight in a criminal case violated the ex post facto clause. This Court held that it did because there was a "material alteration" of the situation to the disadvantage of the criminal defendant. In Collins this Court correctly noted that the result in Thompson was an anomaly and that the definition of the ex post facto clause in that case was substantially broader than the

definition in Calder v. Bull. This case has nothing to do with the size of juries; the dispute concerns a retrospective change in the punishment for a crime to make the punishment more burdensome.

Similarly, the facts in Collins are fundamentally different from the facts of this case. Collins involved a change in Texas appellate practice to allow appellate courts to reform improper criminal verdicts. Tex. Code Crim. Proc. Ann., Art. 37-10(b) (Vernon Supp. 1990). The change allowed an appeals court to reform the complainant's own verdict to delete an improper fine. This change in the law had nothing to do with the definition of a crime, the defenses available to a crime, nor the punishment for a crime. The new law affected the power of Texas appellate courts in relation to Texas trial courts.

The petitioner refers to the change in Georgia's parole eligibility rule as "procedural". Referring to a rule change as "procedural" does not make it so if it affects a substantial interest.

The grant of parole by the State of Georgia to a convicted criminal is a discretionary act. The respondents do not contend otherwise. The factors to be weighed by the parole authorities in deciding whether to grant parole are discretionary and may vary from person to person depending upon a wide variety of facts and circumstances. The point in this case, however, is that the State has changed the rule on eligibility to be considered from a mandated annual reconsideration after initial denial to a mandated reconsideration every eight years. That is an eight fold increase in the time between mandated dates of eligibility for consideration. Whether either of these respondents would or would not receive favorable consideration is irrelevant; their eligibility for consideration has been changed retrospectively and made substantially more burdensome.

On page 9 of the Petition, petitioner characterizes the respondents' reliance upon the State's own rule of eligibility for parole consideration as "reliance upon ... caprice or unlikely windfall." The characterization is the petitioner's, but, in fact, the respondents each were considered for parole after serving seven years pursuant to Rule 475-3-.06 and each was denied parole. Each was reconsidered annually until 1985

when each was put over under the new rule for up to eight years before further reconsideration. See Order of the District Court, Petition, Appendix 2-5. Under the rule in effect until 1985 there was no "caprice."

The State's reference to Damiano v. Florida Parole and Probation Commission, 785 F.2d 929 (11th Cir. 1986) is inapposite. (Petition, p. 11) Damiano and similar "guidelines" cases involve factors to be considered in determining whether parole should or should not be granted. Damiano does not deal with the issue of eligibility to be considered.

B. CONCLUSION

This is a simple case which affects a relatively small number of people, and the decision of the Eleventh Circuit is consistent with the prior decisions of this Court and those of other federal Courts of Appeal which have considered similar cases.

In addition to the respondents Akins and Fate, those who are affected by the Eleventh Circuit's decision are inmates serving life sentences in the State of Georgia for crimes committed prior to the effective date in 1985 of the amendment

to Rule 475-3-.05, paragraph 2 of the Rules of the Georgia Board of Pardons and Paroles. The relief that the State must grant under the Eleventh Circuit's ruling is to provide an opportunity for reconsideration for parole of each such inmate in accordance with the rule in effect at the time of the crime of which he was convicted. Any inmate serving a life sentence for a crime committed after the effective date of the 1985 rule need be considered no more frequently than every eight years after an initial review and denial.

The decision of the Eleventh Circuit is consistent with this Court's holdings in Calder v. Bull and Collins v. Youngblood. Therefore, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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Certificate of Service

The undersigned hereby certifies that he has served the foregoing brief upon the Petitioner in this case by depositing three copies thereof in the United States Mails, proper first class postage prepaid, addressed to his counsel of record for service of process, to wit:

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